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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Adoption of MALIA D., a Minor.

2d Civ. No. B220451
(Super. Ct. No. AD 080084)
(San Luis Obispo County)

RICHARD D., et al.,

Plaintiffs and Respondents,

v.

K.D.,

Defendant and Appellant.

K.D. is the mother of Malia D. Malia's father, Jarrod D., was murdered by K.'s parents. K. was convicted of being an accessory after the fact (Pen. Code, § 32) and of committing perjury during the grand jury proceedings. Though her conviction was as a post-murder accessory, the trial court in the instant matter found her "denial that she knew of her parents' murderous plans before they were carried out is not credible. The inducements that led K.'s parents to plan and carry out Jarrod's murder could only have come from her." The trial court concluded that K.'s complicity was not simply after the fact but of the murder itself. Malia is now thriving in the care and custody of Richard and Susan D., her paternal grandparents, who seek to adopt her. Like the trial court, we

decline to return Malia to the custody of a mother complicit in her father's murder. We affirm.

FACTS AND PROCEDURAL HISTORY

Malia D. was born in July 2000 to K.D. and Jarrod D. Jarrod was shot to death on July 9, 2004, during the course of a custody dispute. K.'s father confessed to first degree murder by lying in wait, and use of a firearm in the commission of that offense. A jury convicted K.'s mother of first degree murder. We affirmed the conviction.¹ K. was arrested on April 14, 2005, and charged with murder and conspiracy in Jarrod's death. In return for her father's plea to first degree murder, K.'s charges were reduced and she pled guilty to the felony of accessory after the fact (Pen. Code, § 32) and two counts of perjury (Pen. Code, § 118) on December 14, 2005. She was sentenced to four years in prison. With custody credits, K. was released on parole in July 2007.

Richard and Susan are Malia's paternal grandparents. After Jarrod's death and prior to K.'s arrest, Richard and Susan petitioned the San Luis Obispo County Superior Court for, and received, visitation with Malia, including overnight visits. On April 15, 2005, after K.'s arrest, the trial court placed Malia with Richard and Susan, and made temporary custody orders awarding them full custody of Malia. Malia has lived in the state of Nevada with Richard and Susan since that time.

In May 2006, Richard and Susan filed a petition in the Clark County, Nevada Superior Court to be appointed Malia's temporary guardians. On June 15, 2006, it appointed Richard and Susan as general guardians of Malia's person and estate.

On January 10, 2008, following her release from prison, K. filed a petition in Clark County, requesting that Malia be returned to her custody. On May 22, 2008, a conference between the California and Nevada courts pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam. Code, §§ 3400, 3410) resulted in a decision that jurisdiction for proceedings regarding Malia was properly in

¹ (*People v. Jones* (Sept. 23, 2009, B194567) [nonpub. opn.])

California. Subsequently, the Nevada court issued an order stating that its prior order appointing Richard and Susan as Malia's guardians was void and transferred the custody proceedings to the San Luis Obispo County Superior Court.

On August 29, 2008, Richard and Susan filed an adoption request with the San Luis Obispo County Superior Court. On September 2, 2008, they filed a petition for freedom from parental control and custody of Malia pursuant to Probate Code section 1516.5 and Family Code sections 7822 and 7825, and to be appointed Malia's temporary guardians. On December 3, 2008, the court appointed Richard and Susan temporary guardians of Malia nunc pro tunc effective as of April 11, 2006, the date the previous guardianship order was issued by the Nevada court.

A two-day trial commenced on August 26, 2009. The trial court issued its tentative statement of decision on September 9, 2009. K. did not object. On October 6, 2009, the court issued its statement of decision and judgment terminating K.'s parental rights. The trial court found by clear and convincing evidence that K. intentionally abandoned Malia (Fam. Code, § 7822) by (1) committing criminal acts that resulted in her imprisonment for more than two years, (2) failing to communicate with Malia for more than two years, (3) disregarding clearly-stated instructions from a Nevada family court judge to begin reunification services, and (4) failing to provide for Malia's support.

The trial court also found that termination of parental rights was proper because K.'s role in Jarrod's murder showed she was an unfit parent (Fam. Code, § 7825), and because Richard and Susan had sole legal and physical custody of Malia for more than two years and her adoption by them was in her best interests. (Prob. Code, § 1516.5.)

On appeal, K. contends the court did not comply with the requirements of Probate Code section 1516.5 and substantial evidence does not support terminating her parental rights under section 1516.5 or Family Code section 7822 or 7825.

DISCUSSION

1. Probate Code Section 1516.5

K. contends the judgment terminating her parental rights must be reversed because the trial court failed to comply with various provisions of Probate Code section 1516.5.² The statute applies to parents whose custody rights have been suspended during a probate guardianship.³ (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1118.) "Section 1516.5 authorizes the termination of parental rights when the guardianship has continued for at least two years, and the court finds that adoption by the guardian would be in the child's best interest." (*Ibid.*) A termination of parental rights proceeding under this statute occurs when the parent has failed to exercise any custodial responsibility over a child for a two-year period. Thus, the statute does not require a showing that the parent is currently unfit. As guardianship continues for an extended period, the child develops an interest in a stable, continuing placement, and the guardian acquires a recognized

² Section 1516.5 states: "(a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding pursuant to Part 4 (commencing with Section 7800) of Division 12 of the Family Code, if all of the following requirements are satisfied:

" (1) One or both parents do not have the legal custody of the child.

" (2) The child has been in the physical custody of the guardian for a period of not less than two years.

" (3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following:

" (A) The child and the birth parent.

" (B) The child and the guardian, including family members of the guardian.

" (C) The child and any siblings or half-siblings.

" (b) The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code.

"(c) The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.

"(d) This section does not apply to any child who is a dependent of the juvenile court or to any Indian child."

³ The statute does not apply to guardianships established in juvenile dependency proceedings under the Welfare and Institutions Code. (§ 1516.5, subd. (d).)

interest in the care and custody of the child. Section 1516.5 requires the court to balance all the familial interests in deciding what is best for the child. (*Ibid.*)

A. The Temporary Guardianship Order Was Valid

K. asserts the court was without jurisdiction to enter its December 3, 2008, order granting temporary guardianship of Malia to Richard and Susan because it made the order effective nunc pro tunc as of April 11, 2006, the date the guardianship order was issued by the Nevada court. K. argues that the 2008 order was invalid because the Nevada court declared its 2006 order to be void. As a consequence, the court violated some unspecified portion of section 1516.5.⁴

We will assume, as do respondents, that K. is arguing that subdivision (a)(2) of section 1516.5, requiring that Richard and Susan have physical custody of Malia for two years, has not been fulfilled because the 2006 guardianship order was declared void by the Nevada court. As a consequence, there was no legal custody in effect between 2006 and 2008. The argument is without merit.

The San Luis Obispo County Superior Court obtained jurisdiction of the matter pursuant to the UCCJEA in 2005 when it issued its guardianship orders. (Fam. Code, § 3421.) That jurisdiction is exclusive and continuing. (Fam. Code, § 3422; see, e.g., *Taylor M. v. Superior Court* (2003) 106 Cal.App.4th 97, 109-110 [California court had jurisdiction over infant, where it made a custody determination prior to any action by a Texas court].) There is nothing in the record showing that the guardianship order issued by the California court was terminated any time thereafter. Having properly acquired jurisdiction, the California court did not lose that jurisdiction when the Nevada court issued its invalid order. By making its 2008 guardianship order effective as of the date the Nevada court issued its order, the California court did nothing more than employ its previously-acquired jurisdiction and exercise its power under Family Code section 3443, subdivision (b), to "utilize any remedy available under other laws of this state to

⁴ Respondents assume that K. is asserting a violation of section 1516.5, subdivision (a)(2), requiring the child to be in the physical custody of the guardians for at least two years.

enforce a child custody determination made by a court of another state." (See *Phillips v. Phillips* (1953) 41 Cal.2d 869, 875 [the general rule in California is that "[c]ourts have inherent power to enter judgments *nunc pro tunc* so as to relate back to the time when they should have been entered"].)

B. The Investigative Report Complied with Statutory Requirements

K. argues the investigative report prepared for the court was incomplete because the court-appointed investigator did not personally interview Malia and explain to her the nature of the proceedings, but instead relied on interviews and a letter from Malia's therapist for this information.

Probate Code section 1516.5, subdivision (b) states: "The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code."

Family Code section 7851 states: "(a) The juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department shall render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child.

"(b) The report shall include all of the following:

"(1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control.

"(2) A statement of the child's feelings and thoughts concerning the pending proceeding.

"(3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents.

"(4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing.

"(c) If the age, or the physical, emotional, or other condition of the child precludes the

child's meaningful response to the explanations, inquiries, and information required by subdivision (b), a description of the condition shall satisfy the requirement of that subdivision.

"(d) The court shall receive the report in evidence and shall read and consider its contents in rendering the court's judgment."

At trial, the investigator explained that he referred questions concerning Malia to Deborah Roberts, Malia's therapist since 2005. In addition to the investigator's report, the court received as evidence a letter written by Roberts to the investigator in which she states that she interviewed Malia regarding the termination proceedings. Roberts stated in the letter that: "Malia understands that it would mean that she would always be able to live with her grandparents and not have to go live with her mother" and "Malia clearly states that she wants to live with her paternal grandparents and stay here with her friends and her life in Nevada."

During trial, K. did not challenge the sufficiency of the report. Issues not raised at trial usually will not be considered on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [father's failure to raise inadequacy of social worker's report in proceeding terminating his parental rights].)

Moreover, there is nothing in the statute precluding the investigator from relying on Malia's therapist for an assessment of the child's feelings. Section 7851 itself permits the court to rely on the report of a therapist. It was not error for the investigator to delegate this portion of the investigation to the person most knowledgeable about Malia's feelings.

Finally, any error in this regard was harmless beyond a reasonable doubt. "The purpose of the investigation and report required by the statute is to provide the court with a full understanding of the factual setting of the petition for termination of parental rights." (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1381.) As stated above, the court received information about Malia's feelings from the person best equipped to

provide that information. As no prejudice occurred, any noncompliance with section 1516.5, subdivision (b), was harmless error.

C. No Violation of the Indian Child Welfare Act

Appellant asserts the court failed to make the inquiries required by the Indian Child Welfare Act (ICWA).⁵ Probate Code section 1516.5, subdivision (d) states: "This section does not apply. . . to any Indian child." California Rules of Court, rule 5.480 states in part: "This chapter addressing the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) . . . applies to all proceedings involving Indian children that may result in [a] . . . declaration freeing a child from the custody and control of one or both parents"

California Rules of Court, rule 5.481(a)(1) states in part: "The party seeking a . . . declaration freeing a child from the custody or control of one or both parents . . . must ask the child, if the child is old enough, and the parents . . . whether the child is or may be an Indian child and must complete the Indian Child Inquiry Attachment (form ICWA-010(A)) and attach it to the petition" The form adoption request (ADOPT-200) filed by Richard and Susan had a box checked that Malia did not have Indian ancestry. Attached to the guardianship petition filed by Richard and Susan was a form "Child Information Attachment." That form contains the question: "Do you know or have reason to know . . . that this child may be an Indian child?" Again, the "no" box was checked.

K. did not claim at any stage of the proceedings that Malia has Indian ancestry, and there is nothing in the record to indicate Susan and Richard did not ask K. or establish by other means whether Malia was an Indian child. The trial court accepted Susan and Richard's statement in this regard. In the absence of evidence to the contrary, we must presume that the information in the record is correct. (See, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 ["A judgment or order of a lower court is

⁵ Although K. did not raise ICWA compliance in the trial court, the failure to do so does not waive the issue. (*In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1385.)

presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness”].)

Even if there were some technical defect, where, as here, there is no showing by offer of proof or other affirmative assertion of Indian heritage, there is no miscarriage of justice and reversal is not required. (See *In re H.B.* (2008) 161 Cal.App.4th 115 [technical noncompliance with ICWA notice procedures excused where parents denied Indian ancestry]; *In re N.E.* (2008) 160 Cal.App.4th 766, 769-770 [where parents do not claim Indian ancestry, failure to comply with ICWA notice procedures was harmless error]; *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 942-943 [in the absence of any evidence to support a reasonable inference child might have Indian heritage, no requirement to make further or additional inquiries].)

D. The Findings Required by Probate Code Section 1516.5 Are Supported by Substantial Evidence

K. contends that the judgment freeing Malia from her custody and control and terminating her parental rights was not supported by substantial evidence. In determining whether substantial evidence supports the judgment, we review the entire record in the light most favorable to the judgment. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) We determine whether there was evidence that was reasonable, credible, and of solid value so that the trier of fact could conclude that it was appropriate to terminate K.’s parental rights. (*Ibid.*) We presume the trier of fact found every fact that reasonably could have been deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

Probate Code section 1516.5 permits the termination of parental rights if (1) it is established that the guardianship continued for at least two years, and (2) the court determines that it is in the minor’s best interests that she be adopted by the guardian. (*In re Guardianship of Ann S., supra*, 45 Cal.4th at p. 1118.) The court made the required findings in this case.

Undisputed evidence in the record establishes that Richard and Susan have had custody of Malia since 2005; thereby satisfying the first requirement. (See, e.g., *In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1376 [section 1516.5 requires a showing of custody for two years].)

The second finding required by the statute-that the best interests of the child will be served by adoption-also is amply supported by the record. K. has had no contact with the child since 2005. Richard and Susan have accepted Malia into their home, provided for her needs, obtained counseling for her to address the problems created when she lived with K., and provided stability that K. cannot provide. Richard and Susan love Malia and Malia loves Richard and Susan. Richard and Susan want to adopt her. These facts alone amply support the trial court's conclusion that it was in Malia's best interests to have K.'s parental rights terminated, thus freeing Malia for adoption.

*2. The Finding of Abandonment Pursuant to
Family Code Section 7822 is Supported by Substantial Evidence*

K. asserts termination of her parental rights was error under Family Code section 7822 because she did not abandon Malia or intend to abandon her.

Family Code section 7822 states in part that abandonment or intent to abandon is established if: "(a)(2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child. . . . [¶] (b) The . . . failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section."

K. asserts she was precluded from supporting Malia or communicating with her because she was incarcerated. This argument has been rejected by numerous courts. (See, e.g., *In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1012 [being incarcerated does not, in and of itself, provide a legal defense to abandonment]; *In re Rose G.* (1976) 57 Cal.App.3d 406, 424 [same].) The last time K. had seen or spoken with Malia was in April 2005. At the time she filed her petition with the Clark County Superior Court in February 2008, she was told by the court she could pursue reunification services leading to regaining custody of Malia if she filed a motion with the court. She did not do so. She has provided no financial support for the child, even though she obtained a job after she was released from prison. Substantial evidence supports the finding of abandonment.

3. The Finding of Parental Unfitness pursuant to Family Code

Section 7825 is Supported by Substantial Evidence

K. asserts substantial evidence does not support the finding that she is an unfit parent under Family Code section 7825.

Family Code section 7825 states in part: "(a) A proceeding under this part may be brought where both of the following requirements are satisfied: [¶] (1) The child is one whose parent or parents are convicted of a felony. [¶] (2) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child. In making a determination pursuant to this section, the court may consider the parent's criminal record prior to the felony conviction to the extent that the criminal record demonstrates a pattern of behavior substantially related to the welfare of the child or the parent's ability to exercise custody and control regarding his or her child."

The felony conviction must involve "egregious underlying facts that have a direct bearing on parental fitness." (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1539.) K. was indicted for murdering her husband. She pleaded to the lesser offenses only after her father agreed to plead guilty to first degree murder. As the trial court

found, the underlying facts show K. conspired with her parents to kill Jarrod. It is difficult to imagine facts more egregious than these.

*4. The Court Did Not Err in Accepting the Parties' Stipulation
To Waive Appointed Counsel for Malia*

K. asserts the trial court erred in failing to appoint counsel for Malia in violation of Family Code section 7861.⁶ As with many of the issues raised on appeal, K. did not raise the issue in the trial court and we may deem the issue waived. (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 163-164.)

Not only did K. not raise the issue in the trial court, she entered into a stipulation with Richard and Susan agreeing that no counsel need be appointed for Malia. The record shows that the stipulation was submitted to the court without objection by K. (See *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1269 [execution of stipulation estops party from arguing to the contrary on appeal].) We presume that the court considered the stipulation and determined that Malia's best interests did not require appointment of counsel. (See, e.g., *In re Julian R.* (2009) 47 Cal.4th 487, 498-499 [reviewing court applies general rule that trial court is presumed to be aware of and followed the applicable law. Thus when a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order].) Under these circumstances, no violation of Family Code section 7861 occurred.

Moreover, an assertion of a violation to the right of counsel requires a showing that a miscarriage of justice occurred. (*In re Richard E.* (1978) 21 Cal.3d 349, 354.) Here, there was no prejudice. Malia's rights were adequately protected in the trial court by the able representation of Richard and Susan's counsel. The court had full knowledge of all the facts necessary to find that terminating K.'s parental rights was in

⁶Family Code section 7861 states: "The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel. The child shall not be present in court unless the child so requests or the court so orders."

Malia's best interests. Independent counsel for Malia in the trial court would have added nothing to the proceedings.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

E. Jeffrey Burke, Judge
Superior Court County of San Luis Obispo

Ernesto Paz Rey, under appointment by the Court of Appeal, for Appellant.
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